

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

TRAYVON R. CAIL,

CASE NO. 2:22-cv-00031-LK

Petitioner,

## ORDER ADOPTING IN PART REPORT AND RECOMMENDATION

DONALD R. HOLBROOK,

### Respondent.

This matter comes before the Court on the Report and Recommendation of United States Magistrate Judge David W. Christel, Dkt. No. 9, the objections thereto filed by pro se Plaintiff Trayvon Cail, Dkt. No. 10, and the parties' supplemental briefing, Dkt. Nos. 13, 14. Having reviewed the Report and Recommendation, Mr. Cail's objections, and the balance of the record, the Court adopts the Report and Recommendation in part, dismisses this habeas petition, and grants Mr. Cail a certificate of appealability solely on the issue of whether he is entitled to equitable tolling.

## 1                   **I.        BACKGROUND**

2                   The background facts and procedural history are set forth in the Report and  
3 Recommendation and are adopted here. Dkt. No. 9 at 1–2. Mr. Cail, who is currently incarcerated  
4 following his state court convictions for murder and first-degree robbery, filed a petition for writ  
5 of habeas corpus under 28 U.S.C. § 2254 on January 10, 2022. Dkt. No. 1 at 1; Dkt. No. 3. The  
6 Respondent, Donald Holbrook, argued that the petition should be denied as untimely and, in any  
7 event, that it fails on the merits. Dkt. No. 7 at 15–17 (timeliness issue).

8                   **A.        The Report and Recommendation**

9                   Judge Christel recommended dismissal of the habeas petition because it was filed after  
10 expiration of the one-year statute of limitations under the Antiterrorism and Effective Death  
11 Penalty Act of 1996 (“AEDPA”). Dkt. No. 9 at 3–5. The statute of limitations ran on May 23,  
12 2019, one year after Mr. Cail’s judgment of conviction became final. *Id.* at 4. Judge Christel  
13 explained that although the statute of limitations is subject to statutory tolling while a properly  
14 filed personal restraint petition (“PRP”) is pending, the PRP that Mr. Cail filed on July 17, 2019  
15 did not toll the statute of limitations because it was filed after the one-year limitations period had  
16 already expired. *Id.* at 4. And, although the statute of limitations is also subject to equitable tolling,  
17 Mr. Cail did not argue that he was entitled to equitable tolling or demonstrate that extraordinary  
18 circumstances prevented him from filing a timely habeas petition. *Id.* at 5. Because Mr. Cail’s  
19 petition was untimely, Judge Christel recommended its dismissal with prejudice. *Id.* at 6.

20                   **B.        Objections, Motion for an Extension, and Supplemental Briefing**

21                   Mr. Cail filed timely objections to the Report and Recommendation. Dkt. No. 10. He did  
22 not dispute that his petition was untimely but argued that he is entitled to equitable tolling. *Id.* at  
23 1. Mr. Cail averred that he pursued his rights diligently by “seeking counsel to represent [him] on  
24 appeal.” *Id.* He contended that his counsel “ha[d] a duty to represent [him] in a timely manner and

1 notify [him] of any due dates.” *Id.* His attorney, John Henry Browne, “didn’t disclose information  
 2 of notices in time and failed to timely file a response,” which “[r]esult[ed] in [his petition] being  
 3 time barred. *Id.* (“Attorney received all notices from the courts and failed to disclose/inform [him]  
 4 of notices”).

5 After filing his objections, Mr. Cail filed a motion for an extension of time asking the Court  
 6 to delay issuing a ruling on the Report and Recommendation to allow him time to obtain a  
 7 declaration from Mr. Browne. Dkt. No. 11 at 1–2. In that motion, Mr. Cail explained that the  
 8 declaration will “explain that the \_\_\_\_ [sic] was a result of [a] miscalculation on the part of  
 9 petitioner’s former legal counsel, [a]nd should not prevent Petitioner from requesting a pro se writ  
 10 of habeas corpus.” *Id.* at 2–3.

11 The declaration Mr. Cail submitted from Mr. Browne states the following: “I and my law  
 12 office represented Petitioner Trayvon R. Cail in his sentencing and direct appeal. After the Court  
 13 of Appeals affirmed his conviction, we also prepared Mr. Cail’s Personal Restraint Petition  
 14 (PRP).” Dkt. No. 11 at 4. He further states that the attorney in his office who was primarily  
 15 responsible for the PRP delayed filing it to find and interview relevant parties, and as a result, the  
 16 PRP was not filed until July 17, 2019. *Id.* If the PRP had been filed before the statute of limitations  
 17 to file the habeas petition expired, its filing would have tolled the statute of limitations, but because  
 18 it was filed after the statute of limitations ran, it did not toll the limitations period. *See Ferguson*  
 19 *v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (Section 2244(d) does not permit the reinitiation  
 20 of AEDPA’s one-year limitations period when it ends before the state petition is filed). Mr. Browne  
 21 stated that his office’s delay in filing the PRP “meant that the statute of limitations for seeking  
 22 [federal habeas] relief . . . expired on May 23, 2019. Our office failed to recognize this fact or to  
 23 notify Mr. Cail that he would be time-barred from seeking habeas relief in the future.” Dkt. No.  
 24

1 11 at 4; *id.* at 5 (“The delay in our office’s filing of Mr. Cail’s [PRP] prejudiced his opportunity to  
 2 seek federal review as a *pro se* petitioner.”).

3 The Court granted Mr. Cail’s unopposed motion for an extension and considered Mr.  
 4 Browne’s declaration. Dkt. No. 12. However, the declaration was insufficient to demonstrate  
 5 whether equitable tolling should apply as Mr. Cail urged. *Id.* at 5–6. Specifically, the Court was  
 6 unable to determine whether Mr. Browne’s office transmitted timely case status information to  
 7 Mr. Cail; whether Mr. Browne “was retained or otherwise agreed to represent Mr. Cail in his  
 8 federal habeas proceedings or if Mr. Cail believed Mr. Browne represented him for that purpose;”  
 9 whether Mr. Cail pursued his rights diligently; and what additional steps, if any, Mr. Cail took to  
 10 preserve his rights other than hiring counsel to represent him in his state court appeal. *Id.* In light  
 11 of those deficiencies in the record and because Mr. Cail is proceeding *pro se*, the Court gave him  
 12 another chance to present facts to support the applicability of equitable tolling and requested  
 13 supplemental briefing regarding certain listed topics. *Id.* at 6. Mr. Cail filed a supplemental brief  
 14 with attachments, Dkt. No. 13, and Respondent filed a response, Dkt. No. 14.

15 **II. DISCUSSION**

16 **A. Mr. Cail’s New Argument in Objections**

17 The Court first addresses whether to consider Mr. Cail’s new argument—raised for the first  
 18 time in his objections—that he is entitled to equitable tolling. *See* Dkt. No. 9 at 5; Dkt. No. 10 at  
 19 1. The Court has discretion whether to consider arguments made for the first time in objections.  
 20 *See, e.g., Davis v. Port Angeles Sch. Dist.*, No. 3:20-CV-5448-BHS-SKV, 2022 WL 602171, at \*6  
 21 (W.D. Wash. Mar. 1, 2022); *Ewalan v. Wash. State Dep’t of Corr.*, No. C20-5678-JLR, 2021 WL  
 22 5824381, at \*6 n.8 (W.D. Wash. Dec. 8, 2021). Respondent did not object to the Court considering  
 23 the new argument. The Court considers the new argument in light of Respondent’s lack of  
 24

1 objection and because Respondent has had two opportunities to respond to the new argument.<sup>1</sup>

2 **B. Standards for Reviewing a Report and Recommendation**

3 This Court must “make a de novo determination of those portions of the report or specified  
 4 proposed findings or recommendations to which” a party objects. 28 U.S.C. § 636(b)(1); *see* Fed.  
 5 R. Civ. P. 72(b)(3) (“The district judge must determine de novo any part of the magistrate judge’s  
 6 disposition that has been properly objected to.”); *United States v. Reyna-Tapia*, 328 F.3d 1114,  
 7 1121 (9th Cir. 2003) (en banc) (same). The Court “may accept, reject, or modify, in whole or in  
 8 part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1); *see*  
 9 Fed. R. Civ. P. 72(b)(3). However, the Federal Magistrates Act “does not on its face require any  
 10 review at all . . . of any issue that is not the subject of an objection.” *Thomas v. Arn*, 474 U.S. 140,  
 11 149 (1985); *see Reyna-Tapia*, 328 F.3d at 1121 (“[T]he district judge must review the magistrate  
 12 judge’s findings and recommendations de novo *if objection is made*, but not otherwise.”).

13 **C. Equitable Tolling**

14 There is no dispute that unless equitable tolling applies, Mr. Cail’s habeas petition is barred  
 15 by AEDPA’s one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1). However, because  
 16 AEDPA’s limitations period is not a jurisdictional bar, it may be equitably tolled. *Holland v.*  
 17 *Florida*, 560 U.S. 631, 645 (2010).

18 A petitioner is entitled to equitable tolling only upon showing “(1) that he has been  
 19 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way” that  
 20 prevented timely filing. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). “The diligence required  
 21 for equitable tolling purposes is reasonable diligence, not maximum feasible diligence.” *Holland*,  
 22 560 U.S. at 653 (cleaned up). The factors include a causation component that requires courts to  
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24 <sup>1</sup> Respondent did not file a response to Mr. Cail’s objections to the R&R but filed a supplemental brief. Dkt. No. 14.

1 evaluate the petitioner’s diligence “in all time periods,” including after the petitioner is “free from  
 2 the extraordinary circumstance,” to determine “whether the extraordinary circumstance actually  
 3 did prevent timely filing.” *Smith v. Davis*, 953 F.3d 582, 595, 599 (9th Cir. 2020) (en banc). “[I]t  
 4 is only when an extraordinary circumstance prevented a petitioner acting with reasonable diligence  
 5 from making a timely filing that equitable tolling may be the proper remedy.” *Id.* at 600. “To be  
 6 clear, this rule does not impose a rigid ‘impossibility’ standard on litigants, and especially not on  
 7 pro se prisoner litigants—who have already faced an unusual obstacle beyond their control during  
 8 the AEDPA limitation period.” *Id.* (cleaned up). Instead of applying rigid standards or mechanical  
 9 rules, courts must decide whether extraordinary circumstances stood in a petitioner’s way and  
 10 prevented timely filing “based on all the circumstances of the case before it.” *Id.*

11       The Ninth Circuit has made clear that “the threshold necessary to trigger equitable tolling  
 12 under AEDPA is very high, lest the exceptions swallow the rule.” *Miranda v. Castro*, 292 F.3d  
 13 1063, 1066 (9th Cir. 2002) (cleaned up). A petitioner bears the burden of showing that this  
 14 “extraordinary” remedy should apply. *Id.* at 1065.

15       Mr. Cail alleges that he pursued his “rights diligently by seeking counsel to represent [him]  
 16 on appeal,” Dkt. No. 10 at 1, so “the [onus] is on Mr. John H. Browne for causing Cail to be time-  
 17 barred,” Dkt. No. 13 at 4. He further asserts that he “was under the impression that the firm would  
 18 handle the habeas petition” and he was “not informed of Mr. Browne’s discontinued service until  
 19 after this Court sent him a notice . . . [e]ffectively stating that Cail was time-barred.” *Id.* Attorney  
 20 abandonment can in some circumstances support equitable tolling. *See, e.g., Maples v. Thomas*,  
 21 565 U.S. 266, 283 (2012) (holding that the petitioner could not “be faulted for failing to act on his  
 22 own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing  
 23 him.”). But here, Mr. Cail has not shown that Mr. Browne represented him for purposes of his  
 24 habeas petition, and none of the three documents he attaches supports that belief. First, Mr. Cail

1 cites his August 2016 contract with Mr. Browne’s firm, but the “Scope of Work” in the contract  
 2 includes only “Sentencing, Arrest of Judgment, if appropriate, and Direct Appeal,” and expressly  
 3 excludes “additional appeals.” Dkt. No. 13 at 7. Second, he relies on an invoice of payments  
 4 received, *id.* at 13–14, but that document does not reference a federal habeas petition. Third, he  
 5 relies on a May 19, 2022 letter from a paralegal in Mr. Browne’s office transmitting to him the  
 6 State court record filed by Respondent in this case. *Id.* at 16. The paralegal in Mr. Browne’s office  
 7 also noted in a December 2021 letter that she had “typed out” Mr. Cail’s federal habeas petition  
 8 for him and Mr. Cail could sign and file it or complete the other blank version she sent. *Id.* at 15.  
 9 Mr. Cail then filed his habeas petition pro se and it was not signed by an attorney. Dkt. No. 1 at  
 10 15. Therefore, the documents do not support Mr. Cail’s assertion that Mr. Browne represented him  
 11 for purposes of his federal habeas petition or abandoned him in that effort. And even if Mr. Cail  
 12 believed that Mr. Browne’s office represented him by typing his habeas petition in December 2021  
 13 or sending him the record in May 2022, the statute of limitations had already run by that point.

14 Mr. Cail also argues that his petition should not be denied due to his former counsel’s  
 15 “miscalculation” of an unspecified deadline, Dkt. No. 11 at 2, or failure to file the “response”  
 16 (presumably, the PRP) on time, Dkt. No. 10 at 1. But regardless of whether Mr. Browne  
 17 represented him for purposes of the habeas petition—or Mr. Cail reasonably thought he did—  
 18 attorney miscalculations leading to missed deadlines and other “garden variety” claims of  
 19 negligence or excusable neglect are not extraordinary circumstances warranting equitable tolling.  
 20 *Holland*, 560 U.S. at 652; *see also Doe v. Busby*, 661 F.3d 1001, 1012 (9th Cir. 2011) (explaining  
 21 that when petitioners allege that their attorneys were the cause of the untimeliness, “courts must  
 22 examine if the claimed failure was one of mere *negligence* by the attorney, such as inadvertently  
 23 miscalculating a filing deadline in a non-capital case, . . . or a *sufficiently egregious* misdeed like  
 24 malfeasance or failing to fulfill a basic duty of client representation.”) (citations omitted); *Frye v.*

1 *Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001) (“[T]he miscalculation of the limitations period by  
 2 . . . counsel and his negligence in general do not constitute extraordinary circumstances sufficient  
 3 to warrant equitable tolling.”); *Luna v. Kernan*, 784 F.3d 640, 646 (9th Cir. 2015) (explaining that  
 4 “run-of-the-mill mistakes by one’s lawyer that cause a filing deadline to be missed do not rise to  
 5 the level of extraordinary circumstances.”); *Williams v. Uttecht*, No. C20-1482-BHS-MLP, 2021  
 6 WL 2556212, at \*5 (W.D. Wash. May 19, 2021) (recommending dismissal of habeas petition when  
 7 the untimely filing was caused by “the miscalculation by counsel of the federal limitations  
 8 period.”), *report and recommendation adopted*, 2021 WL 2550667 (W.D. Wash. June 22, 2021).  
 9 Therefore, even though Mr. Browne filed the PRP too late to toll the federal habeas deadline, that  
 10 run-of-the-mill mistake is not an extraordinary circumstance warranting equitable tolling.

11 Mr. Cail also contends that Mr. Browne had a duty to notify him of due dates. Dkt. No. 10  
 12 at 1. He does not specify which due dates, but even if he is alleging that Mr. Browne failed to alert  
 13 him of the habeas filing deadline, “[a]n unadorned failure to advise about a limitations period  
 14 would, at best, be simple negligence” that does not warrant equitable tolling. *Holeman v. Ryan*,  
 15 No. CV12-02350-PHX-SRB, 2013 WL 3716603, at \*10 (D. Ariz. Jul. 15, 2013). That is  
 16 particularly true here because Mr. Browne did not represent Mr. Cail for purposes of his habeas  
 17 petition. *See, e.g., Castro*, 292 F.3d at 1067–68 (holding that equitable tolling did not apply when  
 18 the attorney advised the petitioner—whom she represented for his direct review but not for his  
 19 habeas petition—of an incorrect deadline to file his habeas petition).

20 Mr. Cail also alleges that Mr. Browne failed to disclose “notices in time.” Dkt. No. 10 at  
 21 1. “An attorney’s failure to communicate about a key development in his client’s case can . . .  
 22 amount to attorney abandonment and thereby constitute an extraordinary circumstance.” *Gibbs v.*  
 23 *Legrand*, 767 F.3d 879, 886 (9th Cir. 2014). But here, despite a second opportunity through  
 24 supplemental briefing, Mr. Cail still has not explained what notices he did not timely receive or

1 how those resulted in his petition “being time barred.” Dkt. No. 10 at 1; *see also* Dkt. No. 13. Mr.  
 2 Cail’s supplemental brief did not respond to the Court’s questions about what notices he missed,  
 3 how he eventually received them, when and how he learned that the state court of appeals affirmed  
 4 his conviction by order dated April 23, 2018, when he learned of his former counsel’s  
 5 miscalculation, or what “response” and “due dates” he claimed were missed. Dkt. No. 12 at 6. Mr.  
 6 Cail’s vague assertions do not show that extraordinary circumstances stood in his way or  
 7 “prevented” him from timely filing his habeas petition. *Smith*, 953 F.3d at 600. Moreover, because  
 8 he could have filed a federal protective petition while pursuing state court relief, “no extraordinary  
 9 circumstance prevented him from timely filing his federal petition.” *Barry v. Wash. State Dep’t of*  
 10 *Corr.*, 833 F. App’x 700, 701 (9th Cir. 2021).

11 Finally, the timing and contents of Mr. Cail’s petition indicate that he misunderstood when  
 12 his habeas petition was due. In response to the question on the habeas form, “explain why the one-  
 13 year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition,” Mr. Cail  
 14 wrote, “Post-conviction review ended on December 1, 2021, so this petition is timely under 28  
 15 U.S.C. section 2244(d)(2).” Dkt. No. 3 at 13. However, Mr. Cail’s pro se status and potential  
 16 ignorance of the law are not extraordinary circumstances warranting equitable tolling. *See, e.g.*,  
 17 *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006).

18 Because Mr. Cail filed his federal habeas petition outside of the one-year limitation period  
 19 and has not demonstrated that he is entitled to equitable tolling, his petition is time-barred. The  
 20 Court adopts Judge Christel’s Report and Recommendation on this issue and dismisses the  
 21 petition.

22 **D. Evidentiary Hearing**

23 Judge Christel determined that it was not necessary to hold an evidentiary hearing to  
 24 resolve this matter because the Court can resolve whether the petition was timely by reference to

1 the state court record. Dkt. No. 9 at 5. The decision to hold an evidentiary hearing is committed to  
 2 the Court's discretion. *Schrivo v. Landrigan*, 550 U.S. 465, 473 (2007). "In deciding whether to  
 3 grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an  
 4 applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to  
 5 federal habeas relief." *Id.* at 474. The Court agrees that this matter can be decided without an  
 6 evidentiary hearing based on the record before it, which demonstrates that even if Mr. Cail's  
 7 allegations are true, he is not entitled to habeas relief because his petition is untimely and not  
 8 subject to equitable tolling. *See, e.g., Roberts v. Marshall*, 627 F.3d 768, 773 (9th Cir. 2010) (no  
 9 obligation to hold evidentiary hearing when no extraordinary circumstance caused untimely filing  
 10 of habeas petition).

11 **E. Certificate of Appealability**

12 Judge Christel recommended that the Court deny a certificate of appealability because Mr.  
 13 Cail has not made the required "substantial showing of the denial of a constitutional right." Dkt.  
 14 No. 9 at 6 (quoting 28 U.S.C. § 2253(c)(2)). A petitioner satisfies this standard "by demonstrating  
 15 that jurists of reason could disagree with the district court's resolution of his constitutional claims  
 16 or that jurists could conclude the issues presented are adequate to deserve encouragement to  
 17 proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

18 As discussed above, after Judge Christel issued his Report and Recommendation, Mr. Cail  
 19 argued for the first time that equitable tolling applies. Dkt. No. 10 at 1. Although the Court  
 20 disagrees, it grants a certificate of appealability out of an abundance of caution regarding whether  
 21 "jurists . . . could disagree on this issue." *Barry v. Simpson*, C18-6003-BHS, 2020 WL 416284, at  
 22 \*2 (W.D. Wash. Jan. 24, 2020), *aff'd*, *Barry v. Wash. State Dep't of Corr.*, 833 F. App'x 700 (9th  
 23 Cir. 2021). Therefore, the Court does not adopt the R&R on this issue and grants a certificate of  
 24 appealability on the sole issue of whether Mr. Cail is entitled to equitable tolling.

### III. CONCLUSION

For the foregoing reasons, it is hereby ORDERED that:

- (1) The Court ADOPTS IN PART the Report and Recommendation, Dkt. No. 9;
- (2) This action is DISMISSED with prejudice;
- (3) A certificate of appealability is GRANTED on the sole issue of whether Mr. Cail led to equitable tolling and DENIED as to all other issues.

The Clerk is directed to send uncertified copies of this Order to Judge Christel, all counsel of record, and Mr. Cail.

Dated this 29th day of September, 2023.

Lauren King  
Lauren King  
United States District Judge